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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/658,736	09/09/2003	Alan Shluzas	1291.1138101	3377
33469 7590 03/03/2010 CROMPTON, SEAGER & TUFTE, LLC 1221 NICOLLET AVENUE SUITE 800 MINNEAPOLIS, MN 55403-2420				
EXAMINER WOODALL, NICHOLAS W				
ART UNIT 3775		PAPER NUMBER		
MAIL DATE 03/03/2010		DELIVERY MODE PAPER		

**Please find below and/or attached an Office communication concerning this application or proceeding.**

The time period for reply, if any, is set in the attached communication.

### Office Action Summary

**Application No.**

10/658,736

**Applicant(s)**

SHLUZAS ET AL.

**Examiner**

Nicholas Woodall

**Art Unit**

3775

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --  
**Period for Reply**

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

**Status**

- 1) ☒ Responsive to communication(s) filed on 08 September 2009.
- 2a) ☐ This action is **FINAL**. 2b) ☒ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

**Disposition of Claims**

- 4) ☒ Claim(s) 20-29 is/are pending in the application.
- 4a) Of the above claim(s) \_\_\_\_\_ is/are withdrawn from consideration.
- 5) ☐ Claim(s) \_\_\_\_\_ is/are allowed.
- 6) ☒ Claim(s) 20-29 is/are rejected.
- 7) ☐ Claim(s) \_\_\_\_\_ is/are objected to.
- 8) ☐ Claim(s) \_\_\_\_\_ are subject to restriction and/or election requirement.

**Application Papers**

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on \_\_\_\_\_ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.  
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).  
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

**Priority under 35 U.S.C. § 119**

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some \* c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
  2. ☐ Certified copies of the priority documents have been received in Application No. \_\_\_\_\_.
  3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

\* See the attached detailed Office action for a list of the certified copies not received.

**Attachment(s)**

- 1) ☐ Notice of References Cited (PTO-892)
- 2) ☐ Notice of Draftsperson's Patent Drawing Review (PTO-948)
- 3) ☐ Information Disclosure Statement(s) (PTO/SB/22)
- 4) ☐ Interview Summary (PTO-413)  
Paper No(s)/Mail Date: \_\_\_\_\_
- 5) ☐ Notice of Informal Patent Application
- 6) ☐ Other: \_\_\_\_\_
- Paper No(s)/Mail Date: \_\_\_\_\_

**DETAILED ACTION**

1. In view of the Pre-Appeal Request filed on September 8<sup>th</sup>, 2009, PROSECUTION IS HEREBY REOPENED. New grounds of rejection are set forth below.

To avoid abandonment of the application, appellant must exercise one of the following two options:

- (1) file a reply under 37 CFR 1.111 (if this Office action is non-final) or a reply under 37 CFR 1.113 (if this Office action is final); or,
- (2) initiate a new appeal by filing a notice of appeal under 37 CFR 41.31 followed by an appeal brief under 37 CFR 41.37. The previously paid notice of appeal fee and appeal brief fee can be applied to the new appeal. If, however, the appeal fees set forth in 37 CFR 41.20 have been increased since they were previously paid, then appellant must pay the difference between the increased fees and the amount previously paid.

***Claim Rejections - 35 USC § 103***

2. The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

3. Claims 20-29 are rejected under 35 U.S.C. 103(a) as being unpatentable over Puno (U.S. Patent 5,360,431) in view of Mathews (U.S. Patent 6,033,406) and Foley (U.S. Patent 5,792,044) and Davison (U.S. Publication 2001/0011170).

Puno discloses a multi-level method of treating the spine via a posterior approach comprising placing a fusion device, i.e. a bone graft, in an intervertebral disc

space between a first vertebra and a second vertebra in combination with a spinal fixation system (column 8 lines 1-9), wherein the spinal fixation system includes at least one fastener in each vertebral body being immobilized by the method and an elongated member attached to the fasteners (see Figure 1). The fasteners further include a screw and U-shaped head housing that receives the head, i.e. joint, of the screw and the elongate member and the joint allows movement of the housing (see column 5 lines 47-50 and Figure 2). Puno fails to disclose the method further comprising the steps of adding a bone growth material, i.e. osteoinductive proteins or morphogenic proteins, on the fusion device, advancing a decompression tool into the surgical site to perform a decompression procedure, i.e. a laminectomy and facetectomy, on the vertebrae, and inserting an access device in a first configuration through an incision of the skin until a distal portion is located adjacent the spine, actuating the access device to a second configuration having an enlarged cross-sectional area at the distal portion spanning at least a portion of the multiple vertebrae, and performing the surgical procedures through the access device. Mathews teaches a method of treating the spine further including adding an osteogenic material to a fusion device positioned between two adjacent vertebral bodies (column 5 lines 6-11) in order to increase the amount of bone growth between the adjacent vertebral bodies. Foley teaches a method comprising the step of inserting a decompression tool into a surgical site to perform a decompression procedure on the vertebrae in order to reduce pressure on the spinal cord. Davison teaches a method comprising the steps of inserting an access device in a first configuration through an incision of the skin until a distal portion is located adjacent the

spine, actuating the access device to a second configuration having an enlarged cross-sectional area at the distal portion spanning at least a portion of the multiple vertebrae, and performing various surgical procedures, such as decompression and fixation procedures, through the access device in order to provide a larger working area while reducing the amount of trauma experienced by the patient. It would have been obvious to one having ordinary skill in the art at the time the invention was made to provide the invention of Puno further comprising the steps of adding osteogenic material to the fusion device in view of Mathews, advancing a decompression tool into the surgical site to perform a decompression procedure on the vertebrae in view of Foley, and inserting an access device in a first configuration through an incision of the skin until a distal portion is located adjacent the spine, actuating the access device to a second configuration having an enlarged cross-sectional area at the distal portion spanning at least a portion of the multiple vertebrae, and performing the surgical procedures through the access device in view of Davison in order to increase the amount of bone growth between the adjacent vertebral bodies, to reduce pressure on the spinal cord, and to provide a larger working area while reducing the amount of trauma experienced by the patient.

#### ***Response to Arguments***

4. Applicant's arguments, see the notice of appeal, filed September 8<sup>th</sup>, 2009, with respect to the rejection(s) of claim(s) 20-29 under 103(a) have been fully considered and are persuasive. Therefore, the rejection has been withdrawn. However, upon

further consideration, a new ground(s) of rejection is made in view of Puno and Haider and Foley and Davison as discussed above.

***Conclusion***

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Nicholas Woodall whose telephone number is (571)272-5204. The examiner can normally be reached on Monday to Friday 8:00 to 5:30 EST..

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Thomas Barrett can be reached on 571-272-4746. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free). If you would like assistance from a USPTO Customer Service Representative or access to the automated information system, call 800-786-9199 (IN USA OR CANADA) or 571-272-1000.

/Nicholas Woodall/  
Examiner, Art Unit 3775

/Thomas C. Barrett/  
Supervisory Patent Examiner, Art  
Unit 3775